NO. 38398-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM MULHOLLAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Gerald L. Knight, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object to the State's proposed aggressor instruction.

2. By submitting the aggressor instruction to the jury, the trial court violated appellant's constitutional right to present a defense and to be convicted only upon proof of every element of the charged offense beyond a reasonable doubt.

3. Appellant was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to request a "no duty to retreat" instruction.

4. The trial court erred when if failed to grant appellant's motion for a mistrial.

5. The cumulative effect of these errors deprived appellant of his constitutional right to a fair trial.

6. The life sentence in this case constitutes cruel punishment in violation of the Eighth Amendment to the United States Constitution and article 1, § 14 of the Washington Constitution.

7. The Persistent Offender Accountability Act violates the "Guarantee" Clause of article IV, § 4 of the United States Constitution and article 1, § 32 of the Washington Constitution.

8. The Persistent Offender Accountability Act violates the ex post facto clause of article I, § 10 of the United States Constitution and article 1, § 23 of the Washington Constitution.

9. The Persistent Offender Accountability Act constitutes a Bill of Attainder, forbidden by article I, § 10 of the United States Constitution and article 1, § 23 of the Washington Constitution.

10. The Persistent Offender Accountability Act violates the Due Process Clause of the 5th and 14th Amendments to the United States Constitution.

11. The trial court erred by imposing a life sentence without the possibility of parole for appellant's offense.

Issues Pertaining to Assignments of Error

1. Appellant was charged with six criminal offenses. At trial, he claimed self-defense and was convicted on only one charge, second degree assault. Although there was no evidence on that charge that the appellant was the first aggressor, the prosecution requested an aggressor instruction. Defense counsel did not object and the trial court gave the instruction. Was defense counsel ineffective for failing to object to the aggressor instruction where it deprived appellant of his defense?

2. The only purpose of an aggressor instruction is to remove a self-defense claim from the jury's consideration. By submitting the aggressor instruction to the jury where the instruction was not supported by the evidence, did the trial court deprive appellant of his right to present his self-defense claim and his right to have the prosecution prove every element of the charge against him beyond a reasonable doubt?

3. In Washington, a defendant has no duty to retreat when he is assaulted in a place where he is lawfully entitled to be. Evidence at trial revealed

that appellant had the opportunity to flee, but chose to stay and defend himself. The State's theory was that it would have been reasonable for the appellant to flee. Nonetheless, defense counsel failed to request a "no duty to retreat" instruction and the jury was never informed of appellant's right to stand his ground. Was defense counsel ineffective for failing to request the instruction?

4. A State's witness testified that it was appellant's "character" to carry a gun. In light of this testimony, did the trial court err in failing to grant the defense motion for a mistrial?

5. Does the cumulative effect of these numerous trial errors warrant a new trial?

6. Is a life sentence without the possibility of parole for a class B felony cruel punishment in violation of the 8th Amendment to the United States Constitution and article 1, § 14 of the Washington Constitution?

7. Does the Persistent Offender Accountability Act violate the "Guarantee" Clause of article IV, § 4 of the United States Constitution and article 1, § 32 of the Washington Constitution?

8. Does the Persistent Offender Accountability Act violate the ex post facto clause of art. I, § 10 of the United States Constitution and article 1, § 23 of the Washington Constitution?

9. Does the Persistent Offender Accountability Act constitute a Bill of Attainder in violation of article 1, § 10 of the United States Constitution and article 1, § 23 of the Washington Constitution?

10. Does the Persistent Offender Accountability Act violate the Due Process Clauses of the United States Constitution?

11. Did the trial court err by imposing a life sentence without the possibility of parole when the maximum sentence for a class B felony is 10 years in prison?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor's Office charged appellant William Mulholland with six criminal offenses:

Count I	Second Degree Assault of Kelly Wick
Count II	Kidnapping in the First Degree of Kelly Wick
Count III	Second Degree Assault of Orville Roy Schofield
Count IV	First Degree Assault of Kelly Wick
Count V	First Degree Assault of Orville Roy Schofield
Count VI	First Degree Assault of Danielle Zehrung

Each offense was alleged to have been committed while armed with a deadly weapon. CP 64-65.

The case went to trial three times. The first trial ended in a mistrial when one of the State's witnesses testified that Mulholland had been in prison. 3RP[1] 237-247. The second trial also ended in a mistrial when two of the jurors read newspaper articles that mentioned Mulholland's criminal history. 4RP 55-65.

During the third trial, the court dismissed count III for a lack of evidence.

[1] This brief refers to the verbatim report of proceedings as follows: 1RP - September 29, 1995; 2RP - October 23, 1995; 3RP - October 24, 1995; 4RP - October 25 and 26, 1995; 5RP - October 30, 1995; 6RP - October 31, 1995; 7RP - November 1, 1995; 8RP - November 2, 1995; 9RP - November 3, 1995; 10RP - November 6, 1995; 11RP - November 7, 1995; 12RP - March 1, 1996.

The jury acquitted Mulholland on four of the five remaining counts and found him guilty only on count I. 10RP 728; CP 25-35.

The court sentenced Mulholland to life in prison without the possibility of parole pursuant to the mandates of the Persistent Offender Accountability Act ("POAA"), popularly known as the "three strikes and you're out" law. CP 7-16. Mulholland timely filed a notice of appeal. CP 2.

2. Substantive Facts

a. Facts Pertaining to Count I

In June of 1995, Kelly Wick, Roy "Charger" Schofield, and Danielle Zehrung shared a duplex in Lake Stevens, Washington. Schofield and Zehrung were dating at the time. Wick was friends with the other two. 5RP 28-29.

William Mulholland was in the business of fixing and selling cars. He agreed to help an acquaintance, Mike Haney, sell his 1968 El Camino. Mulholland knew Schofield and knew that he had owned that very car in the past. He contacted Schofield and asked him if he would be interested in repurchasing the car. Schofield said yes. 6RP 203-05; 10RP 750-52, 756.

On June 4, Schofield and Haney met at Mulholland's home and agreed to the terms of the sale. 6RP 205-06; 10RP 752. The two agreed on a sale price of $1,000 with Mulholland paying a portion at that time, taking possession of the car, and then paying the balance the next day. Schofield left with the car. 6RP 206; 10RP 753.

The next day, Haney telephoned Mulholland and told him that he could not get in touch with Schofield. Mulholland felt some responsibility and agreed to help. 10RP 754, 756. Shortly thereafter, Schofield's brother, Robert Bleam,

stopped by Mulholland's house. With Bleam's help, Mulholland tried Schofield's beeper and his home phone number, but also was unable to reach him. 10RP 754-55.

Meanwhile, Schofield had loaned the El Camino to his housemate, Wick. 5RP 30. Wick is a convicted felon and has a conviction for first degree armed robbery. 5RP 30. He is also a heroin addict and admits to using and dealing in cocaine and marijuana. 6RP 113-14, 127-28.

Wick drove the El Camino to Everett to visit a few friends. While there, he decided to purchase a Glock 17, .9 mm pistol with a 17-round clip. 5RP 30, 67. He also purchased hollow-tipped rounds, designed to do maximum damage to their target. 6RP 114-15.

Wick knew that because he was a convicted felon, he was violating state and federal law by purchasing the gun. And although he had not been threatened by anyone, he "just had a sense of needing the weapon." 6RP 112-13. Now armed with his new Glock .9 mm with hollow point bullets, Wick decided to stop at a bar for awhile. 5RP 31.

Meanwhile, Mulholland and Bleam still had not contacted Schofield, so they decided to drive to his duplex. 756-57. Before leaving, a mechanic who works for Mulholland handed him a .44 pistol. The mechanic knew Schofield, knew that he was involved in drugs, and thought that Mulholland should have the gun since he was going over there late at night. 10RP 758-59.

Mulholland and Bleam took Bleam's pickup truck to the duplex. 10RP 757. The two stopped for burritos and pop, drove by Schofield's home, and then kept driving when it appeared that no one was home. 10RP 758.

It was now between 12:00 and 12:30 a.m. 10RP 758. Bleam had arranged for the two men to meet with Stan Peterson, a friend of Bleam's, at 12:30 to discuss the sale of another automobile. The two headed toward his house. 10RP 759.

About this same time, Wick left the bar and headed home to the duplex. 5RP 31. While driving on Machias Road, Bleam and Mulholland passed the El Camino coming the other direction. 10RP 759-60. What happened next was disputed at trial.

i. Mulholland

According to Mulholland, he thought that Schofield was driving the car, so he told Bleam to turn the truck around and catch the El Camino. 10RP 759-60. The car's windows were tinted, making it impossible to see the driver. Mulholland motioned for the driver to roll down the window. When the window came down, he was surprised to see Wick, whom he did not know, driving the car. 10RP 750, 760.

Mulholland turned to Bleam to ask who the driver was and, at that moment, heard a "bang." 10RP 760. Both Bleam and Mulholland believed that they had been fired upon. Mulholland leaned down in his seat and told Bleam to give the truck some gas, pass the El Camino, and then hit the brakes. 10RP 760-61.

Bleam did so and both vehicles came to a stop. Bleam then started screaming about a gun. Mulholland grabbed the .44 revolver, fired it once in the air, and yelled "what's going on"? 10RP 762.

Bleam and Wick knew each other and, once they recognized one another,

the situation was quickly defused. Mulholland explained to Wick that he had fired the .44 only because he thought Wick had fired on them. Mulholland knew that the El Camino was prone to backfire, and he and Wick discussed the possibility that that was what they had all heard. Mulholland put the gun back in the truck. 10RP 762, 804-06.

ii. Wick

Wick's version of what occurred on Machias Road differed considerably. At the time of his testimony, Wick was awaiting trial on a charge of delivering heroin. 5RP 55. He was also under investigation for possession of stolen property. 6RP 129. And although Wick had not made a deal with the State regarding any favors for his testimony, Wick was aware that the State could dismiss or reduce the pending charge against him in exchange for his testimony. 6RP 128-29.

Prior to testifying against Mulholland, Wick took a polygraph test and failed. The State made a pretrial motion to exclude any evidence of Wick's failure. According to the prosecutor, he did not want any "questions concerning the fact that Mr. Wick took a polygraph and basically flunk[ed] it." 2RP 12.

According to Wick, he saw Bleam's vehicle rapidly approach the back of the El Camino and begin to pass. 5RP 32. Wick did not know that it was Bleam's truck behind him and decided not to let the truck pass.[2] 5RP 32; 6RP 101, 118. Wick stepped on the accelerator and simultaneously heard a very loud bang, which he believed to be a backfire. 5RP 32.

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[2] Wick's explanation at trial for why he prevented the vehicle from passing was "Why not"?

At trial, Wick testified that he looked over at the truck, saw Mulholland pointing a gun at him, and knew that he had been fired upon. 5RP 32-33. According to Wick, he hit the brakes, attempted to turn the El Camino around, and then became stuck when the battery to the car came loose. Wick claimed that Mulholland ran up to him, yelled at him, and pistol-whipped him. 5RP 34-35.

According to Wick, he was forced at gun point to help Mulholland jump start the El Camino. While doing so, a Sheriff's deputy stopped and asked if he could be of assistance. According to Wick, Mulholland had a gun on him, so he told the deputy that Mulholland and Bleam were simply assisting him with a jump start and that he was not in need of any help. 5RP 35-37.

Wick also testified that Mulholland told him that he would have to die because he was driving the El Camino. 5RP 38-39. He also allegedly told Wick that the Mexican Mafia was holding Mulholland's son until he got the El Camino back and that the Mafia had poisoned Mulholland.[3] 6RP 122-26. According to Wick, Mulholland then forced him at gun point to drive back to the duplex, leaving Bleam behind. 5RP 38-39.

iii. Bleam

Bleam did not corroborate Wick's story. He testified that after he and Mulholland stopped for burritos and pop, they drove to Schofield's. No one was home, so they headed to Peterson's house. On their way, they saw the El Camino.

[3] This was not the only reference at trial to the Mexican Mafia. Shannon Schofield, Roy Schofield's estranged wife, testified that she spoke to Mulholland on June 5, and that Mulholland had complained about her husband ripping off some cocaine and the El Camino. According to Shannon, Mulholland said that he was going to have to take care of her husband or the Mexican Mafia was going to take care of him. 7RP 339-40, 344.

9RP 678, 681-82.

Bleam testified that Mulholland "kind of freaked out" and told him to turn the truck around and catch the El Camino. 9RP 682. As they went to pass, they heard a "big bang" from between the cars and Mulholland ducked down. Bleam also saw a big flash, which appeared to come from the driver's side window of the truck. 9RP 683-84.

According to Bleam, he had been going about 80 mph and then locked up the brakes. Mulholland then ran from the truck and yelled at Wick to get out of the car because it was stolen. 9RP 683-84.

Bleam testified that he never saw Mulholland with a gun in his hand. 9RP 683. He did see a gun, however, on the floor of his truck while Wick and Mulholland attempted to get the El Camino started. Bleam thought it might have been left there by his brother, Schofield, so he put it in the El Camino. 9RP 684-85.

Contrary to Wick's testimony, Bleam testified that he didn't hear Mulholland telling Wick what to say to the Sheriff's deputy. In fact, Mulholland was inside of the El Camino and Wick was outside of the car when Wick spoke to the deputy. 9RP 686-87, 694-95.

Bleam believed that everything was fine between Mulholland and Wick when they drove off together because he heard the two talking about going to the duplex to smoke some pot. Wick and Mulholland drove away in the El Camino, Bleam put his battery back in his truck, and then he also left. 9RP 688.

b. Facts pertinent to counts II-VI[1]

i. Wick

As with count I, Wick's story regarding counts II-VI was also largely inconsistent with that of the other trial witnesses. Moreover, it varied depending on when he told it and to whom. 6RP 133-37, 142-45, 152, 164-66. At trial, Wick was forced to concede that when he told his story to the police, he had "misstated some of the facts." 6RP 136.

Generally, however, Wick's story was that after Mulholland held him at gun point on Machias Road, Mulholland forced him to drive the El Camino back to the duplex. 5RP 39. According to Wick, once inside the duplex, Mulholland made him dial Mulholland's mother on the phone. Mulholland then allegedly took the phone and told his mother that when Schofield and Zehrung showed up, they, and Wick, would have to die. 5RP 41.

Wick testified that 15-20 minutes after they arrived, Schofield and Zehrung came home. Mulholland then ran into the kitchen to meet them at the front door. Instead of running out the back door or calling 9-1-1, Wick pulled out his Glock, which had been in his pants the whole time, and chambered a round. 5RP 42-43.

According to Wick, he then heard Mulholland say "You know the drill, mother fucker, get your bitch in the house." 5RP 44. Wick testified that Schofield responded, "I've got your shit," which Wick understood to mean cocaine. 5RP

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[4] Although the court dismissed count III and the jury acquitted Mulholland on the remaining counts, the testimony regarding these counts is relevant to put count I in perspective and to shed additional light on Wick's credibility.

44. He conceded on cross-examination, however, that Schofield may actually have said "I've got your money," which is what he had originally told police that Schofield said. 6RP 142-45.

At that point, Mulholland handed Schofield the phone and allegedly said "You explain this to the people so that I can get my kid back." 5RP 45. Wick testified that after a short pause, he heard a gunshot. He claimed that he then looked around the corner and saw Zehrung on the floor and Mulholland pointing his gun at her. Wick testified that he thought Zehrung was shot. 5RP 45-46.

Wick pointed his Glock at Mulholland and fired four or five times. Mulholland was hit and fell back against the couch. 5RP 47. According to Wick, Schofield began to run through the kitchen and Mulholland fired at him.[5] 5RP 48.

Wick testified that he and Schofield met in one of the back bedrooms and, without any discussion, wrestled for the gun. Schofield ran out the back door and, according to Wick, he heard another shot fired in the living room followed by Zehrung's scream.[6] Wick got on his stomach, left the bedroom, and fired between six and eight additional rounds at Mulholland. According to Wick, Mulholland was returning fire. 5RP 48-49.

Zehrung was in the line of fire. 5RP 49. She was hit by Wick, or Mulholland, or both, and sustained serious internal injuries. 6RP 175-78.

Mulholland ran out the front door. Wick went out the back but came around front and saw Mulholland, who was screaming that he did not want to die.

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[5] In his statement to police on the morning of the shooting, Wick never stated that Mulholland fired at Schofield. 6RP 137.

[6] Wick also failed to tell police about this shot and scream. 6RP 166.

Mulholland then got into the El Camino and attempted to drive off. Wick responded by firing "a few more shots" into the El Camino because he did not want Mulholland to get away. He then lost sight of the El Camino as Mulholland drove away. 5RP 50-51.

Within an hour of the shootings, Wick gave a statement to the police. He lied, telling them that the Glock was not his and that he had found it in the El Camino. 6RP 116-17. He was arrested for a criminal matter unrelated to his actions on June 6, and eventually bailed out.[7] 6RP 132.

ii. Mulholland

Mulholland disputed Wick's testimony. He testified that shortly before he and Wick left for the duplex, Bleam informed him that he had put the .44 in the car. 10RP 767. He denied pointing the gun at Wick or threatening to kill Wick. 10RP 762-63.

He testified that once back at the duplex, he called home to arrange a ride, but no one was home. He also called his mother. Because he and Wick had decided to smoke some pot, Wick went out to the El Camino (where Wick had left his stash) and returned with the pot and a beer, which the two drank.[8] Wick sprinkled cocaine on the pot and then smoked it. Mulholland refused because of the added cocaine.[9] 10RP 769-71.

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[7] Wick is apparently very unlucky. Shortly after bailing out of jail, he filed a claim with the police alleging that he had again been kidnapped at gun point -- this time by Schofield and Zehrung. Thus, twice in one month he had the misfortune of being the victim of a kidnapping. 6RP 147-48.

[8] During cross-examination, Wick admitted that he left the duplex to go out to the El Camino but claimed a loss of memory regarding why he went back to the car. 6RP 149-51.

[9] Police later found a large glass bong, commonly used for smoking pot, and white

Mulholland heard Zehrung's car pull up, so he walked out to the front room. His gun was either in his jacket pocket or under his arm, and the only thing that he had in his hands was a portable phone. 10RP 771.

Mulholland told Schofield that he was upset because he did not want further involvement in the sale of the car. Mulholland and Schofield argued a bit. They then went into the kitchen to call Haney. Mulholland put his gun on the kitchen table and was able to reach Haney by phone. 10RP 772-73.

According to Mulholland, as he handed the phone to Schofield, he heard a "bang" to his right. He felt a round hit his chest and was knocked over in his chair. In response, he reached for the .44, which went off, shooting the floor. He then fell onto the couch. 10RP 774-76. Although he could not see Wick firing at him, he knew that the shots were coming from one of the back bedrooms. He was hit many times, sustaining damage to his arm, chest, spleen, and heart. 10RP 777-78.

Mulholland returned fire, but at trial could not clearly remember in which directions he had fired. 10RP 779. He then went out the front door, fell down the front steps, and got into the El Camino. He heard rounds coming through the back window, one of which hit him in the arm. He managed to get away and was eventually airlifted to Harborview Hospital. 10RP 780-82.

iii. Schofield

Schofield's version of what happened at the duplex, although not always consistent or clear, also differed from Wick's. He testified that when he entered

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powder in the bedroom. The powder tested positive for the presence of cocaine. 7RP 415-16.

the front door, Mulholland said something to the effect of "Hey man, where you been . . . [Haney's] been looking for you." 6RP 213. At that point, he and Mulholland argued about why he had not contacted Haney. 6RP 213-15.

According to Schofield, Mulholland eventually handed him the phone and told him to talk to Haney. Mulholland then walked away from Schofield and started to walk back towards him again when Schofield heard the sound of gunfire. Although he could not say for sure from where the first shot came, he believed it came from the hallway to the bedrooms. 6RP 249. Schofield testified that it appeared as though Mulholland was being shot in the back. He could hear Mulholland screaming and saw him on the couch. 6RP 215-19, 245-46, 249-50.

According to Schofield, he got up and ran out of the kitchen, down the hallway, and into a back bedroom. 6RP 218-19. As he ran out the back of the duplex, he saw Wick. Schofield ran to call 9-1-1, and Wick "went back in to shoot Billy some more." 6RP 222.

Schofield testified that he did not see Mulholland with a gun prior to Mulholland being shot and that a contrary statement he had previously made was incorrect. According to Schofield, the only point at which he may have seen a gun in Mulholland's hand was when Wick was shooting Mulholland and it appeared that Mulholland was in the process of dropping his gun. Schofield also testified, contrary to Wick, that he never saw Mulholland point his gun at Zehrung. 6RP 218-21, 251-53, 257-58.

In response to Schofield's testimony, the prosecutor engaged him in the following exchange:

> Q: So you're telling us that you did not see Billy come out of the hallway which leads to the bedrooms with a gun in his

right hand pointing it at you?

A: I assumed he had a gun.

Q: What led you to assume that he had a gun?

A: That's just the character --

6RP 258. At that point, the court cut Schofield off and ordered the jury out of the courtroom. 6RP 258.

The court chastised the prosecutor for asking his open-ended question and asked if it was his goal to cause a mistrial. 6RP 258. Defense counsel moved for a mistrial and pointed out that a cautionary instruction would not suffice. The court denied the motion and told the jury to disregard Schofield's testimony. 6RP 259-60.

iv. Zehrung

Zehrung's testimony was consistent with Schofield's in that when she entered the duplex she did not see Mulholland with a gun, either. 7RP 298. According to Zehrung, Schofield was sitting on his knees in the dining room and he and Mulholland were talking loudly. Mulholland told her to sit down and not say anything. 7RP 291-92.

She remembered Mulholland handing Schofield the telephone and the next thing she remembered was seeing Mulholland fire his gun in the direction of the kitchen, which was the first time she had seen the gun. 7RP 298, 318-20. She heard "a bunch of gunfire" but could not tell from where it was coming. 7RP 295. The next thing she recalled was the helicopter ride to the hospital. 7RP 295.

Zehrung had no memory of Mulholland pointing a gun at her or shooting

her. She admitted that she told the police that Mulholland shot her, but explained that she said that only because that was what Schofield and Wick had told her at the hospital. 7RP 319-21.

v. Mark Kowall

Another witness who testified at trial was Mark Kowall, called by the defense. At the time of trial, Kowall was serving time at a work-release facility for a first degree theft conviction. He had known Schofield for a few years, and, just prior to trial, Schofield had been in the same facility. 10RP 848-49.

According to Kowall, he had heard Schofield talk about Mulholland in the past. On one occasion, Schofield told Kowall that he "didn't like Mulholland and would do anything to get him." 10RP 851. More recently, while in the work release facility, he told Kowall that the shooting of Mulholland was long overdue, it was too bad he could not have finished off Mulholland, and that, in fact, he had ordered someone named "Kelly" to finish Mulholland off. He also told Kowall that he had had "a back-up gunman" in the woods to finish Mulholland off in case he made it outside the duplex. 10RP 850.

Schofield admitted that he had spoken to Kowall about the shootings, but denied ever making these statements. 10RP 846-47.

c. Jury Instructions and Closing Argument

The defense theory was self-defense. 10RP 814. The trial court instructed the jury on self-defense, and the prosecutor did not except. 10RP 862-77; CP 59-60.

The prosecutor did, however, request an aggressor instruction. 10RP 856-57. Defense counsel failed to object, and the trial court gave the instruction.

10RP 875. That instruction reads:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon or toward another. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 61.

The State's theory was that Mulholland sought Schofield out on June 6 because he was upset about Schofield's breach of the agreement regarding the sale of the El Camino. The prosecutor suggested that perhaps the case also involved a breach of an agreement to sell cocaine. 11RP 913-14.

The prosecutor conceded that Schofield's testimony was "not worth a whole lot" and that Zehrung was unable to remember much. 11RP 922. According to the prosecutor, therefore, the case came down to Mulholland versus Wick. 11RP 924. The prosecutor told the jury that it was "abundantly clear [that Wick] is no saint" and conceded that there were inconsistencies in his statements to the police and his testimony at trial and in previous hearings. 11RP 925-26.

Despite these concessions, however, the prosecutor argued that Mulholland had no valid self-defense claim for his actions, including those on Machias Road. 11RP 958-59. More specifically, regarding count I, the prosecutor argued that if Mulholland had truly believed he was being fired on by Wick, the reasonable reaction would have been to flee the scene in Bleam's truck. 11RP 918.

The prosecutor also argued that Mulholland's claim of self-defense on

Machias Road should be rejected based on instruction number 23, the aggressor instruction. 11RP 909. The prosecutor told the jury that the crux of the entire case was the question of who was the aggressor. He specifically asked the jury to consider who was the initial aggressor on Machias Road. 11RP 909, 911-12, 919.

Defense counsel agreed that the State's case depended on Wick. Counsel pointed out that his testimony was not supported by the other witnesses, he had shown himself to be a liar, and that he had an incentive to perjure himself given his pending charge and other potential charges stemming from his possession of drugs and the .9 mm pistol. 11RP 933, 936-943.

The jury acquitted on every count but count I, which charged Mulholland with the second degree assault of Wick on Machias Road. CP 25-35.

d. Sentencing

In pretrial pleadings, Mulholland made several motions addressed to the process due when the State makes a persistent offender allegation under the POAA. He also argued that the POAA violated a number of guaranteed rights under the State and Federal Constitutions.[10] 12RP 970, 976-78; CP 17-20.

The trial court denied Mulholland's motions and rejected his constitutional challenges. 12RP 978-80. The court then sentenced him to "life without the possibility of parole." CP 8; 12RP 983.

Mulholland now appeals to this Court.

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[10] Defense counsel filed three sentencing memoranda regarding the POAA. 12RP 760. Only one made it into the trial court file. The arguments contained in the missing memoranda are summarized, however, in the State's response memorandum. Supp. CP ___ (sub no. 80, State's Second Sentencing Brief).

C. ARGUMENT

1. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE AGGRESSOR INSTRUCTION, WHICH WAS UNSUPPORTED BY THE EVIDENCE REGARDING COUNT I, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.[1]

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

a. Counsel's Failure to Object was Deficient

Defense counsel's failure to object to the aggressor instruction falls well short of what could be considered reasonable. According to the Washington Supreme Court, "[f]ew situations come to mind where the necessity for an aggressor instruction is warranted." State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985). It is reversible error to give such an instruction when it is not supported by the evidence. State v. Wasson, 54 Wn. App. 156, 161, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989); State v. Brower, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986).

To support an aggressor instruction, there must be evidence that the defendant engaged in an intentional act reasonably likely to provoke a belligerent

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[11] A claim of ineffective assistance of counsel may be raised for the first time on appeal where the appellant claims that trial counsel erroneously failed to object to an aggressor instruction. See State v. Davis, 119 Wn.2d 657, 665-66, 835 P.2d 1039 (1992).

response, which precipitated the incident. This act must be an act separate from the assaultive conduct. Wasson, 54 Wn. App. 159; Brower, 43 Wn. App. at 902.

This Court's decisions in Brower and Wasson demonstrate circumstances where an aggressor instruction is inappropriate. In Brower, the defendant's companion argued with the victim over a drug deal. The defendant, who testified that the victim was acting aggressively toward him, drew a gun and pointed it at the victim, for which he was charged with assault. Brower, 43 Wn. App. 896-97. The trial court gave the jury an aggressor instruction. The jury rejected Brower's self-defense claim and convicted him. Brower, 43 Wn. App. at 897, 901.

This Court reversed, stating:

> Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident with [the victim]. . . . If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper. The inclusion of the instruction effectively deprived him of his theory of self-defense . . . .

Brower, 43 Wn. App. at 902 (citation omitted).

Similarly, in Wasson, there was an absence of any intentional, provoking act that precipitated the assaultive conduct. Wasson and his cousin were fighting. The victim attempted to intercede. According to Wasson, the victim attacked his cousin and then attacked him, and Wasson responded by shooting the victim. In contrast, the victim testified that without provocation, he was attacked by both men. Wasson, 54 Wn. App. at 158.

The trial court gave an aggressor instruction and this Court reversed, concluding that "there is no evidence that Mr. Wasson acted intentionally to

provoke an assault from [the victim]. In fact, there is evidence that Mr. Wasson never initiated any act toward [him] until the final assault. Under these circumstances, our holding in [Brower] is controlling." Wasson, 54 Wn. App. 159.

As in the above cases, there was no evidence in Mulholland's case to support an aggressor instruction for count I. If the jury accepted Wick's testimony, it found that Wick was driving along Machias Road in the El Camino when Bleam and Mulholland approached from behind in Bleam's pickup. 5RP 32. When the pickup pulled alongside of the El Camino, Mulholland assaulted Wick by firing his gun at him and then continued to assault him after the El Camino stalled by continuously holding him at gun point and verbally threatening to kill him. 5RP 32-35, 37-39.

Under any reasonable interpretation of this evidence, Mulholland could not have been considered an aggressor. There was, therefore, no evidence to support the giving of the instruction and counsel should have objected on that basis. State v. Johnson, 29 Wn. App. 807, 815, 631 P.2d 413, review denied, 96 Wn.2d 1009 (1981) (failure to except to an instruction which might otherwise be cause for reversal if excepted to "may well demonstrate a lack of effective representation.").

Mulholland's testimony was more than sufficient to raise self-defense as an issue for the jury. See State v. McCullum, 98 Wn.2d 484, 488-89, 656 P.2d 1064 (1983). Indeed, the prosecution did not object to the self-defense instructions. 10RP 856-77. And given that the only purpose of an aggressor instruction is to remove self-defense from the jury's consideration, there was no conceivable

tactical reason not to object regarding count I.

Counsel's performance was deficient.

b. Counsel's Deficient Performance Prejudiced Mulholland

To establish prejudice, Mulholland need only show a "reasonable probability" that but for counsel's error, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland , 466 U.S. at 693-94).

There is certainly a reasonable probability here. As argued above, had counsel objected to the aggressor instruction for count I, the trial court would have been required under the law and the evidence to reject the instruction. In the absence of an objection, however, the jury was left to speculate whether any of Mulholland's actions on Machias Road made him the first aggressor.

The State did not elect a single act on which it was relying for count I. CP 44, 64; 11RP 891, 895-99. Moreover, no unanimity instruction was given. CP 36-63. Therefore, the sequence of events on Machias Road is considered "continuous conduct" constituting a single assault. State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10, cert. denied, 111 S. Ct. 2867 (1991). It is simply impossible to know from which act or acts constituting the alleged assault the jury may have concluded that Mulholland was the first aggressor.

What is clear, however, is that the only possible aggressive or provoking act that the jury could have found was one of the acts constituting the assault itself. A reasonable juror could have mistakenly concluded that Mulholland was not entitled to defend himself because one of these acts made him the first aggressor.

The prosecutor's argument below substantially increased the likelihood of juror error in this regard. The prosecutor's theme during closing argument was that Mulholland was consistently the aggressor. The prosecutor told the jury that the crux of the entire case was the question of who was the aggressor. And he specifically asked the jury to consider who was the aggressor on Machias Road -- Wick or Mulholland. 11RP 909, 911-12, 919.

It is prejudicial error to submit an aggressor instruction where there is no evidence to support it. State v. Thompson, 47 Wn. App. 1, 7, 733 P.2d 584 (citing State v. Heath, 35 Wn. App. 269, 666 P.2d 922 (1983)), review denied, 108 Wn.2d 1014 (1987). In Brower and Wasson, the possibility of resulting juror error required a new trial. The same result is required here.

The circumstances regarding count I undermine confidence in the verdict

and require reversal. Mulholland should receive a new trial on that count.

2. BY SUBMITTING THE AGGRESSOR INSTRUCTION ON COUNT I, THE COURT VIOLATED MULHOLLAND'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND TO BE CONVICTED ONLY UPON PROOF OF EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

a. Right to Present a Defense

The federal and state constitutional right to due process guarantees a defendant the right to defend against the State's allegations and present a defense. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038, 1045 (1973); Washington v. Texas, 338 U.S. 14, 19, 18 L. Ed. 2d. 1019, 87 S. Ct. 1920, 1923 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990). The Sixth Amendment to the United States Constitution and art. 1, § 22 of the Washington Constitution also guarantee the right to present a defense. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).

Based on these constitutional guarantees, Mulholland had the right to present his claim of self-defense on count I. He was deprived of that right, however, when the court instructed the jury to ignore his claim of self-defense if it found that he was the aggressor.

b. Proof of Every Element

Due process also requires that the State prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Johnson, 100 Wn.2d 607, 614, 674 P.2d 145 (1983), overruled on other grounds, State v. Bergeron, 105 Wn.2d 1, 711 P.2d

1000 (1985). The absence of self-defense is such an element. McCullum, 98 Wn.2d at 493-94.

The aggressor instruction had the effect of omitting this element by improperly permitting the jury to disregard Mulholland's self-defense claim in its entirety.

c. These Challenges may be Raised for the First Time on Appeal

Although neither of the above constitutional challenges were made below, they are properly before this Court. An instructional error of constitutional magnitude may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). In deciding whether an instructional error rises to the level of constitutional error, this Court's decision in State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992), is controlling.

According to Lynn, before this Court will hear a claim raised for the first time on appeal, it will first "make a cursory determination as to whether the alleged error in fact suggests a constitutional issue." Lynn, 67 Wn. App. at 345. Second, this Court will determine whether the error is manifest, i.e., whether the asserted error has practical and identifiable consequences at trial. If these requirements are satisfied, this Court will address the merits of the claim. Lynn, 67 Wn. App. at 345. These requirements are met here.

First, the error certainly suggests constitutional issues. As argued above, the aggressor instruction deprived Mulholland of his constitutional right to have the State prove every element of the charged offense beyond a reasonable doubt -- in this case, the absence of self-defense. The Washington Supreme Court has recognized that a jury instruction that omits an element of an offense is a manifest constitutional error. Scott, 110 Wn.2d at 688 n.5; Johnson, 100 Wn.2d at 623. Moreover, the instruction deprived Mulholland of his constitutional right to present a defense.

This is not a case where Mulholland is attempting to circumvent the rules of appellate procedure by clothing a nonconstitutional argument in constitutional garb. Rather, it is clear that the claimed error in fact suggests constitutional issues.

The claimed error was also "manifest," described by the Lynn court as having an "unmistakable, evident or indisputable" impact at trial. Lynn, 67 Wn. App. at 345. An error affecting constitutional rights is presumed prejudicial. State v. Allen, 67 Wn. App. 824, 828, 840 P.2d 905 (1992). The erroneous aggressor instruction effectively deprived Mulholland of his defense at trial by

removing the question of self-defense from the State's proof and the jury's consideration. Given Wick's extreme credibility problems, the erroneous aggressor instruction surely impacted Mulholland's trial on count I.

For these additional reasons, Mulholland should receive a new trial on that count.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A "NO DUTY TO RETREAT" INSTRUCTION.

Just as counsel's representation may be deficient based on a failure to object to an instruction that is unsupported by the evidence, counsel's representation may also be deficient for failing to offer an instruction that was supported by the evidence and would have aided the defense. See State v. Thomas, 109 Wn.2d 222, 226-29, 743 P.2d 816 (1987) (counsel ineffective for failing to offer instruction regarding defendant's mental state where defendant charged with felony flight and defense was intoxication). Here, trial counsel was ineffective for failing to offer a "no duty to retreat" instruction.

As discussed above, to demonstrate ineffective assistance of counsel, Mulholland must show 1) deficient representation -- that counsel's performance fell below an objective standard of reasonableness; and 2) prejudice -- a reasonable probability that but for counsel's error, the result of the trial would have been different." Benn, 120 Wn.2d at 663.

a. Counsel was Deficient

It has long been the law in Washington that a person bears no duty to retreat where he is assaulted in any place where he has a right to be. State v. Allery, 101 Wn.2d 591, 598, 692 P.2d 312 (1984). And a defendant is entitled to a "no duty to retreat" instruction whenever there is sufficient evidence in the record to support it. Allery, 101 Wn.2d at 598 (citing State v. King, 92 Wn.2d 541, 599 P.2d 522 (1979)).

Recently, in State v. Williams, 81 Wn. App. 738, 916 P.2d 445 (1996), this Court reaffirmed both of these principles and clarified under what circumstances such an instruction is required. Williams involved an appeal by codefendants Charles and Nalen Williams of their convictions for felony murder. Williams, 81 Wn. App. at 739.

At trial, Charles testified that while he was standing in the street, the decedent, Joseph Wade, threatened him with a knife. Charles responded by grabbing a shovel, advancing on Wade, and then backing away. Charles' brother, Nalen, then arrived on the scene and took the shovel. Now disarmed, Charles left and grabbed a pitchfork. When he returned, Nalen was trying to disarm Wade by knocking the knife from his hands. Charles testified that Nalen killed Wade when he hit him in the back of the head with the shovel. Nalen claimed that Charles had inflicted the lethal blow with the pitchfork. Williams, 81 Wn. App. at 740.

The trial court instructed the jury that self defense is justified only when the force used "is not more than necessary." Williams, 81 Wn. App. at 741. The court also instructed the jury that force was "necessary" only where no "reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended . . . ." Williams, 81 Wn. App. at 741. The court denied the defendants' request for a "no duty to retreat" instruction. Williams, 81 Wn. App. at 741.

This Court reversed. In doing so, it repeated the long-standing rule that "[f]light, however reasonable an alternative to violence, is not required" in Washington. Williams, 81 Wn. App. 743-44. Citing to Allery, this Court emphasized that a defendant is entitled to a "no duty to retreat" instruction whenever the "evidence supports a finding that the defendant was assaulted in a place where the defendant was lawfully entitled to be." Williams, 81 Wn. App. at 742.

Mulholland was entitled to such an instruction. According to his testimony, he believed that he was being assaulted based on the loud "bang" that he heard while next to the El Camino and based on Bleam's warnings of a gun, which further led him to believe that Wick was armed. Moreover, Mulholland was lawfully entitled to be on Machias Road -- he had every right to stand his ground rather than flee. Had he requested a "no duty to retreat" instruction for count I, the court would have been required to give it.

b. Mulholland Suffered Prejudice

Williams is also instructive regarding the question of prejudice resulting from the absence of a "no duty to retreat" instruction. The Williams court recognized that the failure to instruct the jury regarding the absence of a duty to retreat raised the possibility in that case that the jury had rejected the Williams' claims on improper grounds.

> In the absence of the "no duty to retreat" instruction, a reasonable juror could have believed Charles, or Nalen, or both, but could have erroneously concluded that the brothers used more force than was necessary because they did not use the obvious and reasonably effective alternative of retreat. Thus, we clarify the rule, and hold that where a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense,

the no duty to retreat instruction should be given.

Williams , 81 Wn. App. at 744 (emphasis added). Because there was a possibility that the jury had erroneously concluded that the Williams' failure to retreat resulted in excessive force, this Court refused to find the error harmless. Williams , 81 Wn. App. at 744.

Williams is soundly reasoned and demonstrates the degree of prejudice to Mulholland. As in Williams , the jury here was instructed that self-defense is justified only when the force used "is not more than necessary." CP 59. As in Williams , the jury here was instructed that force was "necessary" only where "no reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended . . . ." CP 60. And, as in Williams , the absence here of a "no duty to retreat" instruction raised the possibility that a reasonable juror may have found that Mulholland otherwise acted reasonably, but nonetheless used excessive force because he never used the obvious and reasonably effective alternative of retreat.

It is impossible to know whether one or more of the jurors fell prey to this inviting error. There is as strong a possibility here as in Williams . On at least two occasions, Mulholland certainly had the opportunity to flee. The first was when he and Bleam were passing Wick and heard what they believed to be a gunshot. Instead of continuing on and avoiding any further contact with Wick, Mulholland chose to defend himself by making Bleam stop the truck in front of the El Camino. 10RP 760-61.

The second occasion was after the truck stopped. Mulholland heard Bleam yelling about a gun. Instead of driving off at that point, particularly since

the El Camino was now stranded, Mulholland again chose to remain. 10RP 762.

The jury may have believed Wick's testimony that Mulholland pointed the .44 at him, believed that Mulholland acted reasonably in doing so based on his belief that he was being fired upon, but erroneously concluded that Mulholland was required to retreat, either while passing Bleam or after both vehicles had stopped.

Indeed, the prosecutor asked the jury to conclude that Mulholland should have fled. During cross-examination, the prosecutor strongly implied that had Mulholland wanted to get away from Wick, he should have done so by simply driving away -- either before or after both vehicles came to a stop. 10RP 797-805. Moreover, during closing argument, the prosecutor argued that

> the defendant suggests that they hear this bang, he ducks down, he says, go, go, go, and they go, go, go, accelerate, and then they stop. Well, if someone is shooting at you, isn't it reasonable to continue on going to try to get away from that situation? But no, the indication is that, no, they stop, Mr. Mulholland then gets out of the vehicle, and with this -- takes this revolver and fires it into the air. . . .

11RP 918.

This line of questioning and argument, combined with the absence of a "no duty to retreat" instruction, effectively invited the jurors to consider retreat as an alternative to the force used. This could have been prevented by a proper instruction.

There is a reasonable probability that absent trial counsel's failure to request the "no duty to retreat" instruction, the result on count I would have been different. This probability undermines confidence in the outcome of Mulholland's

trial on that count.

Mulholland should be retried on count I by a jury that is properly and fully instructed on the law.

4. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A MISTRIAL BASED ON SCHOFIELD'S TESTIMONY THAT IT WAS MULHOLLAND'S "CHARACTER" TO CARRY A FIREARM.

As discussed above, during the prosecutor's direct examination of Schofield, Schofield testified that he did not see Mulholland pointing a gun at him, but assumed that he was armed. The prosecutor responded by asking why. Although Schofield was not permitted to complete his answer, he did manage to testify that his assumption was based on Mulholland's character. 6RP 258.

After Schofield's testimony, the trial court asked the prosecutor if his goal in asking Schofield that question was to have the case end in a mistrial. 6RP 258-59. The court's concern over the exchange was appropriate. Its remedy was not.

The court merely instructed the jury that "if you were able to hear what this witness's last answer was to the last question, I'm instructing you that it has been struck and you are to totally disregard it." 6RP 260. This instruction was simply insufficient. Instead, the court should have granted defense counsel's motion for a mistrial.

When examining a trial irregularity, such as Schofield's remark, the question is whether the remark so prejudiced the jury that the defendant was denied his right to a fair trial. If it did, the trial court should have granted a mistrial. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

In deciding whether Schofield's remark may have had this impact, this

Court examines (1) the seriousness of the remark, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254.

The trial court's denial of Mulholland's motion for mistrial is reviewed for an abuse of discretion. The court abused its discretion if no reasonable judge would have reached the same conclusion. Johnson , 124 Wn.2d at 76. An examination of the above criteria reveals an abuse of discretion here.

First, Schofield's statement was very serious. Both Mulholland and Schofield testified that they had known each other for a few years. 6RP 200; 10RP 750. Thus, Schofield was in a position to have observed Mulholland in the past and know his character. His testimony that he assumed Mulholland was armed on June 6 based on his character cast Mulholland in an extremely poor light.

Not only did Schofield's testimony tell the jury that Mulholland was the type of person who walked around armed with a firearm, it also undercut Mulholland's testimony at trial. The State's theory was that Mulholland armed himself on the night of June 6 because he was "out looking for trouble." 11RP 912. Mulholland disputed that scenario and testified that he was carrying a gun only because it was given to him for protection. 10RP 758-59.

Schofield's remark significantly and improperly impeached Mulholland's testimony. In a case that came down to "Mulholland versus Wick," Schofield's testimony significantly altered that credibility contest by casting Mulholland in a bad light and strongly implying that he was a liar.

Schofield's testimony becomes even more serious when one considers the paucity of evidence against Mulholland on count I. Prosecution of that count depended entirely on Wick's testimony, which was inconsistent and substantially impeached. After Schofield's remark, however, Wick achieved an unearned air of credibility.

The second factor, whether Schofield's testimony was cumulative, also supports Mulholland's argument that a mistrial was warranted. Schofield's testimony was irrelevant and not cumulative of any other testimony at trial.

The third factor is whether the trial court instructed the jury to disregard Schofield's testimony. The trial court did. However, that is not the end of the question. This Court must also examine whether the instruction could cure the prejudice. Escalona, 49 Wn. App. 254-55. It could not.

Schofield's testimony portrayed Mulholland as the type of individual one would expect to be armed. This portrayal, combined with the resulting impeachment of Mulholland's testimony regarding the .44, was simply too significant for the jury to disregard.

This was a close case. Schofield's improper testimony regarding Mulholland's bad character deprived Mulholland of a fair trial. The trial court abused its discretion in refusing the defense motion for a mistrial.

5. THE CUMULATIVE EFFECT OF THE TRIAL ERRORS DENIED MULHOLLAND HIS RIGHT TO A FAIR TRIAL.

Every defendant has the right to a fair trial, which is guaranteed both by the Federal and State Constitutions. U.S. Const. amend. 6; Wash. Const. art. 1, § 22. Cumulative trial error may deprive a defendant of this right. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

This is precisely what occurred in Mulholland's case. Assuming that this Court concludes that neither the erroneous presence of the aggressor instruction, nor the erroneous absence of the "no duty to retreat" instruction, nor Schofield's improper character evidence, by itself, warrants reversal, the combined effect of these errors certainly warrants reversal. Their cumulative effect deprived Mulholland of his constitutional right to a fair trial.

6. THE LIFE SENTENCE IMPOSED IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 14 OF THE WASHINGTON CONSTITUTION.

The Eighth Amendment to the United States Constitution specifies that "cruel and unusual punishment [shall not] be inflicted." Similarly, article 1, § 14 of the Washington Constitution provides that "cruel punishment [shall not be] inflicted." The Washington Constitution provides greater protection than its federal counterpart. State v. Fain, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980); State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); State v. Thorne, 129 Wn.2d 736, 772-73, 921 P.2d 514 (1996); State v. Rivers, 129 Wn.2d 697, 712-13, 921 P.2d 495 (1996).

There is no static test by which courts can determine whether a sentence is cruel and unusual, for "the Eighth Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958); Solem v. Helm, 463 U.S. 277, 291 n.17, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983) ("no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment").

Although it is most often applied in capital cases, proportionality analysis is required for felony sentences such as Mulholland's, which are the product of recidivist statutes. Harmelin v. Michigan, 501 U.S. 957, 115 L. Ed. 2d 836, 866, 111 S. Ct. 2680 (1991) (Kennedy, O'Connor, and Souter, J.J., concurring); Manussier , 129 Wn.2d at 676-77. Where the crime committed and the sentence imposed are grossly disproportionate, the sentence is unconstitutional. Harmelin , 115 L. Ed. 2d at 871-72; Hart v. Coiner, 483 F.2d 136, 143 (4th Cir. 1973); People v. Gaskins, 923 P.2d 292, 296-97 (Colo. Ct. App. 1996); Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E.2d 205, 214 (1981).

A sentence may be so disproportionate to the gravity of the offense as to also constitute cruel punishment under art. 1, § 14 of the Washington Constitution. Fain, 94 Wn.2d at 402. In making a determination of

proportionality, a court should evaluate (1) the nature of the offense, (2) the legislative purpose behind the habitual criminal statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction. Manussier , 129 Wn.2d at 674; Fain, 94 Wn.2d at 397.

a. Nature of the Offense

Mulholland's prior "strike" offenses were a second-degree assault from 1984 and an attempted first-degree assault from 1989, both of which were class B felonies. CP 8. His current offense is second-degree assault, also a class B felony. RCW 9A.36.021(2).

b. Legislative Purpose Behind the Persistent Offender Statute.

The legislative history reveals that the purpose behind the POAA was to impose a life sentence only on those persons convicted of three serious violent offenses. The statement for Initiative 593 states that

> Initiative 593 brings accountability and the certainty of punishment back to our criminal justice system. In aiming at three time violent offenders, it targets the "worst of the worst" criminals who most deserve to be behind bars.

While the legislative intent and the billing behind the POAA was to punish only the "worst of the worst," its net was cast too wide. In a society where crime includes murders, rapes, and even bombings, a second-degree assault offender, who commits his crime without injury to the victim, is not the "worst of the worst" who most deserves to be behind bars until he dies.

c. Punishment in Other Jurisdictions for the Same Offense.

A brief survey of the habitual offender provisions in some other states reveals that Mulholland's sentence of life without the possibility of early release for

a second-degree assault conviction is far more severe than sentences imposed for the same offense committed in other states.

In Alaska, a defendant convicted of a class B felony is subject to imprisonment for not more than 10 years. AS 12.55.125(d). Clearly, the life sentence imposed for Mulholland's class B felony is drastically more severe than the sentence imposed for a similar offense in Alaska.

In Oregon, Mulholland would not have been considered a "dangerous offender," and therefore would not be subject to the 30-year sentence that such a classification requires. See O.R.S. § 161.725-735. Rather, in Oregon, someone convicted of a class B felony could receive a maximum sentence of 10 years regardless of the number of prior convictions. O.R.S. § 161.605.

In California, a third time offender is sentenced to "an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of [three times the term otherwise provided; 25 years; or the term that would have been imposed with certain enhancements]." Cal. Penal Code § 667(e)(2)(A). This is a less severe sentence than the "true life" without parole sentence Mulholland has received in Washington.

Compared to the sentence Mulholland would have received for this offense in Alaska, Oregon, or even California, the life sentence imposed in this case is disproportionate and cruel.

d. Punishment in Washington for Other Offenses

Aside from the POAA, Washington requires a mandatory life sentence for only one crime: aggravated first degree murder. RCW 10.95.020. The maximum presumptive sentence for non-aggravated murder is 45 years, eight months. RCW

9A.32.030; 9.94A.310, .320. The maximum presumptive sentence for homicide by abuse is the same. RCW 9A.32.055; 9.94A.310, .320. The maximum presumptive sentence for first degree rape is 23 years, four months. RCW 9A.44.040; 9.94A.310, .320. The maximum presumptive sentence for first degree arson is 12 years. RCW 9A.48.020; 9.94A.310, .320.

Although second-degree assault is not a trivial offense, it is less serious than the offenses listed above, which are without question representative of the most onerous crimes that exist in Washington. Where the legislature has deemed it inappropriate to impose life sentences for murder and rape, it is arbitrary and disproportionate to impose a life sentence for the offense at issue here.

Mulholland's life sentence for his second-degree assault conviction is cruel. The sentence is disproportionate to sentences for the same offense in other jurisdictions and to sentences imposed for other offenses in this jurisdiction. The sentence shocks the conscience and should be overturned.

7. THE POAA VIOLATES THE "GUARANTEE" CLAUSE OF ART. IV, § 4 OF THE UNITED STATES CONSTITUTION AND ARTICLE I, § 32 OF THE WASHINGTON CONSTITUTION, WHICH GUARANTEE A REPUBLICAN FORM OF GOVERNMENT.

The United States Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. Art. IV, § 4. The United States Constitution is "the Supreme Law of the Land." U.S. Const. Art. VI, cl. 2.

The Framers of Washington's Constitution acknowledged the theories and concerns underlying this country's republican form of government, stating that "[a] frequent recurrence to fundamental principles is essential to the security of

individual right and the perpetuity of free government." Wash. Const. art. 1, § 32.

This provision admonishes to keep constantly in mind the fundamentals of the republican form of government and the people's sovereign rights. Wheeler School Dist. v. Hawley, 18 Wn.2d 37, 137 P.2d 1010 (1943); see also State ex rel. Mullen v. Howell, 107 Wash. 167, 181 P. 920 (1919).[12] The Framers of Washington's Constitution expressly acknowledged that individual rights are of the utmost importance in this state. Article 1, § 1 states that while governments derive their power from the people, governments "are established to protect and maintain individual rights."

As discussed below, because the process that led to the enactment of the POAA lacked the requirements of a republican form of government, which insulate the people from their own passions and prejudices, the act should be held invalid under the Supremacy Clause and art. 1, § 32 of Washington's constitution.

a. The Issue is Justiciable.

The appellant in State v. Manussier raised a similar argument, which the Washington Supreme Court declined to decide.[13] This Court should reach the

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[12] See the following cases citing art. 1, § 32 in support of the protection of individual rights. State ex rel. Robinson v. Fluent, 30 Wn.2d 194, 240, 191 P.2d 241 (Simpson, J., dissenting) (establishing a separation of powers argument), cert. denied, Washington Pension Union v. Washington, 335 U.S. 844, 93 L. Ed. 2d 394, 69 S. Ct. 66 (1948); Southcenter Joint Venture v. National Democratic Policy Committee, 113 Wn.2d 413, 439-40, 780 P.2d 1282 (1989) (Utter, J. concurring) (arguing that § 32 was evidence of the Framers' belief in natural law); State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 548, 202 P.2d 927 (1949) (supporting the right to an impartial trial judge); Dennis v. Moses, 18 Wash. 537, 571-77, 52 P. 333 (1898) (using art. 1, § 32 to construct a constitutionally based right of contract and private property).

[13] See Manussier, 129 Wn.2d at 671 ("Because appellant's argument does not satisfactorily address the power of the court to decide an otherwise political or governmental issue, we decline to rule on it in this case.").

issue here for four basic reasons. First, under the Supremacy Clause, state courts are obligated to enforce federal constitutional law. Howlett v. Rose, 496 U.S. 356, 369-70, 110 L. Ed. 2d 332, 110 S. Ct. 2430 (1990). Absent a "valid excuse," a state court cannot decline to consider a federal question. Id.

Second, although the United States Supreme Court for a time considered the Guarantee Clause to implicate only nonjudiciable political questions, the Court clearly has retreated from that view. See New York v. United States, 505 U.S. 144, 184-86, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992); Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). The Court's retreat is supported by numerous commentators and scholarly opinion. New York, 505 U.S. at 185.[14]

Even absent this trend in the federal courts, the political question doctrine applies to the federal courts and does not permit state courts to decline their own mandate to adjudicate the compatibility of state law with the guarantee of a republican form of government. See State v. Montez, 309 Ore. 564, 603, 789 P.2d 1352 (1990); VanSickle v. Shanahan, 212 Kan. 426, 511 P.2d 223 (1973).[15]

Third, as carefully explained in a recent article by Oregon Supreme Court Justice Linde, the early cases which led the Supreme Court to abrogate its

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[14] Citing L. Tribe, American Constitutional Law 3998 (2d ed. 1988); J. Ely, Democracy and Distrust: A Theory of Judicial Review 118, 122-23 (1980); W. Wiecek, The Guarantee Clause of the U.S. Constitution 287-89, 300 (1972); Merritt, The Guarantee Clause and State Autonomy: Federalism For a Third Century, 88 Colum. L. Rev. 1, at 70-78; Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn. L. Rev. 513, 560-65 (1962).

[15] See also State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 90-91, 273 P.2d 464 (1954) (where the Washington Supreme Court declined to broadly construe the concept of judicially non-cognizable political questions). Indeed, as the Court held in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is."

jurisdiction over Guarantee Clause issues were incorrectly decided. Hans A. Linde, When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality, 72 Or. L. Rev. 19, 24-30 (1993) (discussing, inter alia, Pacific States Telephone & Telegraph v. Oregon, 223 U.S. 118, 140-51, 56 L. Ed. 2d 377, 32 S. Ct. 224 (1912)). As Justice Linde persuasively concluded, even without the benefit of the Court's decision in New York v. United States, "[n]othing in the Supreme Court's case law purports to deny the authority of state courts . . . to decide Guarantee Clause issues." Linde, at 29 n.44.

Fourth, the Washington Supreme Court has shown minimal reluctance to ascribe limits on the people's referendum power. See, e.g., CLEAN v. State, 130 Wn.2d 782, 807-08, 812, ___ P.2d ___ (1996) (a post-Manussier decision in which the court found that great deference is owed to a legislative emergency declaration, even though the declaration deprives the people of the right to referendum; citing numerous cases). The people's reservation of the referendum power derives from the same constitutional source as the initiative power. Wash. Const. art. 2, § 1; see generally State ex rel. Humiston v. Meyers, 61 Wn.2d 772-776, 380 P.2d 735 (1963) (citing cases). Where the Washington Supreme Court has determined appropriate limits on the people's referendum power, there is no valid excuse not to determine whether similar limits govern the initiative power when such limits are mandated by the Guarantee Clause.

This Court should, therefore, reach the issue raised here.

b. The Use Of Direct Initiatives To Enact Laws Like I-593 Is Precluded Under Art. IV, § 4 of the Federal Constitution and Art. 1, § 32 of the Washington Constitution Because The Republican Form Of Government Was Intended To Prevent Unchecked Majority Passions From Dominating Government.

The use of direct initiatives to circumscribe liberty is inconsistent with the republican form of government into which the Founders intentionally incorporated a system of checks on the accumulation of power. The republican form of government balances the need for accountability of representatives with the need to control societal factions.

For some types of legislation, the direct initiative process is a dangerous means for the unchecked majority to tyrannize a social group on the bases of race, sex, gender, or general disfavor, and is unconstitutional.

When a state statute violates the United States Constitution, it must be held invalid. Thorsted v. Munro, 841 F. Supp. 1068, 1074 (W.D. Wash. 1994) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810)) (striking down term limit initiative 573). The same rule applies to statutes initiated by voters. Thorsted, 841 F. Supp. at 1074 (citing Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981)).[16]

Although the Constitution does not specifically define the words "republican form of government," the words "due process" or "equal protection of the laws" under the 14th Amendment are no more meaningful without judicial interpretation. There is nothing special about the Guarantee Clause that prevents

[16] Numerous Washington initiatives have already been ruled unconstitutional by the federal courts. See Thorsted, 841 F. Supp. at 1075 n.3 (listing cases).

the courts from developing it in the same manner the courts have developed every other constitutional phrase. John H. Ely, Democracy and Distrust: A Theory of Judicial Review, 1, 123-24 (1980); see also Minor v. Happersett, 88 U.S. (21 Wall) 162, 175, 22 L. Ed. 2d 627 (1875) ("Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended"); In re Eng, 113 Wn.2d 178, 184, 776 P.2d 1336 (1989) (a constitutional provision cannot be construed to bypass or render meaningless another). Therefore, this Court should extend its common use of interpretive principles to decide that the POAA, and initiatives like it, violate the guarantee of a republican form of government.

And even if the existence of direct initiatives is not considered constitutionally inconsistent with the theories behind a republican form of government, it does not follow that the use of direct initiatives will never violate the principles underlying the Guarantee Clause or art. 1, § 32. What distinguishes a direct initiative that is consistent with the republican form of government from one that is not becomes evident from the concerns and fears held by the Framers when they chose to incorporate the representational legislature, the principles of separations of powers, and the principles of federalism into the governmental structure of this country.

(1) The Founders' Intent And Historical Context Show That the Use Of Direct Initiatives Violates The Guarantee Clause and Art. 1, § 32 When It Bypasses the Representative and Deliberative Process of the Legislature And Is Used By A Majority Faction To Enact Laws Based On Collective Passions.

The Founders' concerns about the dangers of direct democracies are revealed in the writings of The Federalist and in the fact that the Guarantee Clause is in the Constitution. When discussing the inevitable problems created by societal factions, Madison stated:

> The inference to which we are brought is, that the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*.
>
> If a faction consists of less than a majority, relief is supplied by the republican principle. . . . It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. . . .
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> From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for mischiefs of faction. **A common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual**. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. . . .
>
> **A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking**.

The Federalist No. 10, at 52-57 (James Madison) (Henry Lodge ed. 1894) (emphasis added).

> Madison explained the difference between a republic and a democracy:
> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere over country, over which the latter may be extended.

The Federalist No. 10, at 57 (James Madison). A republic is "a government which derives all its powers directly or indirectly from the great body of people, and is administered by persons holding their offices. . . ." The Federalist No. 14, at 77-79, No. 39, at 232-39 (James Madison). No state had a direct democracy prior to the Constitution's ratification.[17]

Alexander Hamilton, speaking at the Constitutional Convention, proclaimed:

> We are now forming a republican government. Real liberty is neither founded in despotism or the extremes of democracy, but in moderate government.

1 Records of the Federal Convention of 1787, 432 (M. Farrand ed. 1911). Thus, the Founders intended republican form of government to mean representative democracy where the powers were derived from, not directly exercised by, the people.[18]

The Founders hoped that the deliberative process undertaken by elected representatives, accountable directly to the people, would control or prevent the oppression of one part of society against another.

> Justice is the end of government. It is the end of civil society. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger . . . so . . . will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

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[17] Douglas Hsiao, Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic, 41 Duke L.J. 1267, 1298 (1992).

[18] Modern sources define "republic" as a "government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to the law: representative democracy." Webster's Third New Int'l Dictionary, 1928 (1993).

The Federalist, supra, No. 51, at 326. "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . ." Ely, Democracy and Distrust, at 80 (quoting Madison).

In 1891, the Supreme Court acknowledged the limitations placed on the legislative process in association with the Guarantee Clause:

> By the Constitution, a republican form of government is guaranteed to every State . . . but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

In re Duncan, 139 U.S. 449, 461, 35 L. Ed. 219, 11 S. Ct. 573 (1891).[19]

Elected representatives thus provide protection against factions of society that might otherwise gain arbitrary and complete control while, at the same time, are themselves accountable to the electorate. The founders intended that the republican form of government control even majority factions, to preserve both the public interest as well as social stability. It is a safeguard against the tyranny resulting when a majority of the whole is motivated to invade the rights of other citizens. Thus, with all of its hurdles -- committee studies, hearings, amendments, and compromises -- the legislative process through which representatives make law is the safeguard intended by the Founders.[20] There is no indication that the people are to bypass the deliberative model of the legislature and directly enact laws affecting disfavored sections of society.

The Framers of the Washington Constitution, likewise, expressed their belief that the government exists to preserve and further individual rights. The

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[19] See also West Virginia Board of Education v. Barnette, 319 U.S. 624, 87 L. Ed. 2d 1628, 63 S. Ct. 1178 (1943).

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. . . . One's right to life, liberty, and property, to free speech . . . and other fundamental rights may not be submitted to a vote . . . .

[20] See Hsiao, supra, at 1287-90 (citing David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States, 188 (1984)).

deliberative form of the legislature balances the need for accountability of government with the need to control factional domination and is fully recognized as a key component of a republican form of government.

Thus, the representative, deliberative source of legislation serves two purposes: it filters the views of factions prior to there becoming law and it protects minority rights because the representatives have a duty to govern on behalf of all of the people. The rationale behind this key feature, as discussed above, demands that measures like the POAA make their way through the representational, deliberative process.

(2) Use Of The Direct Initiative Process To Enact Measures Such As the POAA Is Inconsistent With The Guarantee Of A Republican Form of Government When The Measure Targets A Disfavored, Disenfranchised Minority.

The Washington voters, as a whole, represent a quasi "fourth branch" of government. Fritz v. Gorton, 83 Wn.2d 275, 281, 517 P.2d 911 (1974). However, unlike any other branch, this "fourth branch" has a device that allows it to entirely bypass the filters and duties inherent in a representative legislature -- the direct initiative. Thus, the legislature (the plebiscite in this instance) does not fulfill its intended function of protecting and maintaining individual rights because the people are accountable to no one.[21] The direct initiative allows a majority faction to overwhelm and oppress a minority at will.

The minority affected by the enactment of the POAA is a group of persons whom the supporters of the POAA decided to incarcerate for the remainder of their lives simply because they have two or more prior "strikes" against them. The persons effected by the POAA had no effective means of combating or tempering the majority passions on this issue.

[21] The absence of accountability becomes overwhelming where the courts fail to review properly presented legal challenges to the people's exercise of unbridled power.

The supporters of the initiative ignored the realities and problems about crime and crime prevention. In the ongoing debate about the realities of crime, crime prevention is virtually ignored because of current public hysteria. This unbalanced debate is exactly what the representative legislature is designed to prevent. While the causes of a societal faction about crime cannot be prevented, the representative legislature is specifically designed to control its effects.

Legislators have greater access to information from all sides of the debate than the general public has and they have a duty to consider all sides of the debate. If the POAA had passed through the legislature's filter, the issues of the effectiveness of incarceration for life and the funding required for incarceration (appropriations to build prisons, fund long-term health care, create geriatric prison wards, and add employees) would have received due consideration.

In stark contrast to the representative filter, the public often limits consideration to its own fears and passions. The plebiscite that enacted the POAA is exactly the type of uncontrolled faction that a republican government is designed to prevent. That the POAA lacks a funding provision but will cost the taxpayers untold millions further evidences the evils of direct initiative.

The direct initiative process was used by a faction supporting the POAA to enact a law depriving a minority in society of their right to life and liberty. The supporters of the initiative bypassed the deliberative legislative process, with its committee meetings, hearings, amendments, and compromises, by going directly to the people. Because this type of circumvention and unchecked majority will is exactly what the Guarantee Clause is designed to control and prevent, the use of a direct initiative to enact the POAA, and other initiatives like it, violates the

Guarantee Clause and art. 1, § 32.

(3) The Theories Behind Separation Of Powers Also Show That The Use Of A Direct Initiative Violates The Guarantee Clause And Art. 1, § 32.

The separation of powers among the branches of government also is an integral element of the republican form of government. While the doctrine of separation of powers is not expressly contained within a provision of either the Federal or Washington Constitutions, it is a fundamental part of our constitutional system.[22] Each Constitution, on its face, contemplates that the branches will exercise the power and perform the duties granted to them. See Youngtown Sheet & Tube Co., 343 U.S. 579, 593-94, 96 L. Ed. 2d 1153, 72 S. Ct. 863 (1952) (Frankfurter, J., concurring).

In Washington, the courts have used art. 1, § 32 to support separation of powers theories. For example, in 1919, the Washington Supreme Court used this section essentially to establish a separation of powers requirement. State ex rel. Mullen v. Howell, 107 Wash. 167, 181 P. 920 (1919). At issue was the authority of the plebiscite, the quasi "fourth branch," to challenge the legislature's ratification of the prohibition amendment to the Federal Constitution. The court reasoned that the referendum power provided a check on the Legislature and made it more responsive; therefore, in that particular instance, the referendum was a valid exercise of power by the people. Mullen, 107 Wash. at 171.

The separation of powers requirement is tied to the rationale for establishing a representative, deliberative legislature: the ability of one group to tyrannize and oppress another is controlled because the power to propose, pass, enact, and enforce law does not rest solely within the hands of one branch of

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[22] See, e.g., Washington State Motorcycle Dealers Assn. v. State, 111 Wn.2d 667, 674, 763 P.2d 442 (1988) ("The importance of the case before us is that it deals directly with one of the cardinal and fundamental principles of the American constitutional system, both state and federal: the separation of powers doctrine."); In re Juvenile Director, 87 Wn.2d 232, 237-38, 552 P.2d 163 (1976) (The doctrines of separation of powers, checks and balances, and inherent judicial power "are major constituents of our governmental framework."); State v. ex rel. Gunning v. Odell, 58 Wn.2d 275, 278, 362 P.2d 254 (1961) ("The separation of powers doctrine is so fundamental that it needs no discussion."); Household Finance Corp. v. State, 40 Wn.2d 451, 455, 244 P.2d 260 (1952) ("It seems unnecessary to labor the fundamental doctrine of the constitutional division of powers and the reasons therefore.").

government. At the very least, it requires the cooperation of two branches of government before a law, hostile to the individual rights or needs, can be effected. See Tribe, supra, at 19.

The danger of the use of direct initiatives for legislation like the POAA is that the plebiscite is indeed enacting, passing, and enforcing its will on a disfavored, disenfranchised minority. It completely usurped the filtering and balancing function of the representative and deliberative Legislature, it removed the Executive's veto authority, and it severely undermined the court's ability to protect minorities from the unchecked majority will.

Moreover, the use of direct initiatives for legislation like the POAA allows the Legislature to escape responsibility for its decisions by letting it put issues to the public or avoid the issues entirely. The accountability of representatives is jeopardized when they can simply allow the public to enact tough legislation without fear of voters removing them from office. The use of the direct initiative process for measures like the POAA thus allows the representative legislature to abdicate its constitutionally-assigned function. It allows the public to serve as the scapegoat and take the blame for a "bad" decision.[23]

The direct initiative also has tangible effects on the judiciary. The ballot statement indicates that the supporters in fact intended to usurp the judiciary's sentencing discretion: "opponents claim that violent offenders can already be locked up for life. The problem is, they aren't. That will change when 593 becomes law." See Initiative 593, Proponent's Ballot Statement. The use of direct initiatives to enact laws oppressing a minority unquestionably undermines the power of the judiciary, particularly where the public elects its judges. The court's ability to freely fulfill its function of checking the legislative and executive branches is significantly hindered. The freedom of the court to interpret the enacted initiative in a way that will protect minority rights is restricted.

Thus, the use of the direct initiative process to enact measures such as the POAA undermines the essential structure of our government. Neither the Legislature nor the Executive has any check on the initiative process, and the Court's ability to impartially evaluate an initiative's merits is significantly limited by the voters' passionate wrath. Where such power is concentrated solely in the hands of one branch of government -- here, the "fourth branch" -- the Guarantee Clause is violated.

c. Conclusion.

Mulholland does not ask this Court to find that the initiative process is a

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[23] For an analysis of the effect of the initiative process on the California Legislature, see Cynthia L. Fountaine, Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative, 61 S. Cal. L. Rev. 733 (1988).

per se violation of the guarantee of a republican form of government. Nor does he ask the Court to invalidate all laws passed by the direct initiative process. Instead, Mulholland asks this Court to find that some specific types of initiatives, like the POAA, cannot be enacted through this process. The POAA, and other initiatives where the majority oppresses a minority, must, if they are to become law, be directly subject to the safeguards of the representative, deliberative model of the legislative process; otherwise, they undermine the separation of powers and federalism. Because the enactment of the POAA circumvented all of the safeguards of a republican form of government, it violated the Guarantee Clause and art. 1, § 32 and should be declared unconstitutional.

8. THE POAA VIOLATES THE EX POST FACTO CLAUSE OF ARTICLE I, § 10 OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 23 OF THE WASHINGTON CONSTITUTION.

A statute violates the ex post facto clause if it (1) makes a crime more severe than it was when committed; or (2) permits imposition of a greater punishment than permitted when the crime was committed. State v. Hodgson, 44 Wn. App. 592, 722 P.2d 1336 (1986). A statute can also offend the ex post facto clause if it changes legal consequences of an act committed before the statute was enacted. State v. Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985).

In this case, the POAA made Mulholland's prior convictions more severe than they were when committed. It also permitted the imposition of a greater punishment than permitted and changed the legal consequences of the prior convictions. The POAA is, therefore, an unconstitutional ex post facto law.

9. THE POAA CONSTITUTES A BILL OF ATTAINDER.[1]

Article I, § 10 of the United States Constitution provides that "No bill of attainder or ex post facto law shall be passed." Article 1, § 23 of the Washington Constitution contains a similar prohibition. "A bill of attainder is a legislative act which applies to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without judicial trial." State v. Scheffel, 82 Wn.2d 872, 881, 514 P.2d 1052 (1973) (citing United States v. Brown, 381 U.S. 437, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (1965)).

Determining whether a statute constitutes a bill of attainder requires a three-part inquiry: (a) does the statute inflict punishment; (b) does the statute target specific individuals; and (c) does the statute provide for protection from judicial process? Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 847, 82 L. Ed. 2d 632, 104 S. Ct. 3348 (1984); Nixon v. Administrator of General Services, 433 U.S. 425, 468, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1970).

a. Punishment.

There can be no question that a sentence of life imprisonment constitutes punishment.

b. Member of a Group.

The POAA targets a group of offenders that have been convicted on three separate occasions of "most serious offenses." This group is "easily ascertainable" by reference to Department of Corrections Records. See Communist Party v. S.A.C. Board, 367 U.S. 1, 83, 6 L. Ed. 2d 625, 81 S. Ct. 1357 (1960); Putty v. United States, 220 F.2d 473, 478 (9th Cir. 1955).

The fact that the statute applies to all "persistent offenders" rather than

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[24] The following arguments are included despite the Washington Supreme Court's recent contrary decisions in Thorne, Rivers, and Manussier. While counsel is cognizant of criticism of efforts to exhaust state court remedies, federal relief is sometimes granted, and counsel would be remiss by failing to raise these arguments here.

upon a list of named individuals does not remove it from the category of bills of attainder. Brown, 85 S. Ct. at 1721. Although underinclusiveness is a characteristic of most bills of attainder, it is not a necessary feature. "The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated." Brown, 85 S. Ct. at 1715 n.23.

c. Without Judicial Trial.

The POAA does not require a "judicial trial" prior to imposition of a life sentence. Although the "persistent offender" must be convicted of three offenses, there is no special requirement that he be found guilty of being a persistent offender.

In the instant case, there was no judicial trial. Cf. State v. Scheffel, 82 Wn.2d 872, 875-78, 514 P.2d 1052 (1973), appeal dismissed, 416 U.S. 964, 40 L. Ed. 2d 554, 94 S. Ct. 1984 (1974) (because statute provided significant judicial safeguards, defendant's bill of attainder claim was rejected).

The persistent offender sentencing scheme, like the federal statute at issue in Brown, "does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics . . . shall [suffer the proscribed penalty], [nor does it] leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics," Brown, 85 S. Ct. at 1715-16, and imposes punishment on them without a meaningful judicial trial.

The POAA is an unconstitutional bill of attainder because it (a) inflicts

punishment (life imprisonment) on (b) easily ascertained members of a group (persons with three convictions for "most serious offenses") (c) without judicial trial.

10. THE PERSISTENT OFFENDER SCHEME VIOLATES THE DUE PROCESS CLAUSE OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The 5th and 14th Amendments to the United States Constitution provide that no person shall be deprived of liberty without due process of law. The right to liberty is an important, fundamental right. United States v. Salerno, 481 U.S. 739, 750, 95 L. Ed. 2d 697, 107 S. Ct 2095 (1987).

When a state law impinges on a fundamental right, the law violates the Due Process Clause unless it is narrowly drawn to serve a compelling state interest. In re Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). RCW 9.94A.120, as amended by the POAA, violates due process because the initiative was not narrowly drawn to serve a compelling state interest.

Although Mulholland concedes that protection of society from serious violent offenders is a compelling state interest, the POAA is not narrowly tailored to further that interest. Within its list of "most serious offenses," the initiative includes drug offenses, vehicular assault, vehicular homicide, and Mulholland's offense -- second-degree assault. A statute treating these offenders the same as those convicted of three aggravated murders is not narrowly tailored to further the state interest in punishing the most serious offenders with life in prison.

Moreover, the initiative purported to eliminate judicial discretion despite its own stated purpose that "punishment for criminal offenses should be proportionate to both the seriousness of the crime and the prior criminal history." See Initiative 593, § 1(c). Despite this stated purpose, the factual circumstances of an individual predicate crime are not taken into consideration. Nor is the time between convictions considered.

The instant case presents an example of how the initiative fails to target "most serious offenders." Mulholland was convicted of assault offenses. There is no evidence in the record that any of these offenses involved an injury to the victim. That the initiative treats Mulholland the same as someone convicted on three occasions of first degree murder demonstrates that it is not narrowly tailored to further the compelling state interest of protecting society from "most serious offenders."

Thus, the statute is unconstitutional. Mulholland's sentence should be vacated, the Persistent Offender allegation should be dismissed, and the case remanded for a sentence within the SRA standard range.

D. CONCLUSION

Mulholand should receive a new trial on Count I. Short of that, Mulholland respectfully requests that this Court vacate his sentence and remand his case for a sentence within the SRA standard range.

DATED this ___ day of May, 1997.

Respectfully submitted,

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